Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California Court of Appeal properly ruled—in conflict with the Federal Arbitration Act, this Court's precedents, and the decisions of all the federal courts of appeal to have addressed the issue—that parties to an arbitration agreement can be forced to arbitrate as a class or not at all, when their arbitration agreement expressly forecloses the use of class arbitration.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Discover Bank ("Discover") was defendant, appellee and petitioner below. Respondent John Szetela was plaintiff, appellant and respondent below.

Pursuant to S. Ct. Rule 29.6, petitioner states that it is wholly owned by Novus Credit Services, Inc., which is in turn wholly owned by Morgan Stanley, a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Discover Bank ("Discover") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 97 Cal. App. 4th 1094 and reprinted in the appendix hereto ("App.") at 1a. The order of the Supreme Court of California denying Discover's petition for review is unreported and reprinted at App. 12a.

JURISDICTION

The California Court of Appeal issued its decision on April 22, 2002. App. 1a. Rehearing was denied on May 16, 2002. App. 10a. The Supreme Court of California denied Dis-

cover's petition for review on July 31, 2002. App. 11a. On October 21, 2002, Justice O'Connor entered an order extending the time within which to file this petition to and including November 28, 2002. App. 12a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [U.S. Const., art. VI, cl. 2.]

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

INTRODUCTION

This case presents the question whether under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, a state court may require parties to an arbitration agreement to proceed with class arbitration or forgo arbitration altogether, when the terms of their agreement to arbitrate expressly preclude a class arbitration procedure. It is also one of the unusual cases in which all the customary criteria for certiorari are readily met.

First, the California Court of Appeal's decision conflicts with the decisions of the federal circuit courts to have con-

sidered the same issue. S. Ct. Rule 10(b). The Seventh Circuit has held that courts are without authority to order class-wide arbitration unless the parties have expressly agreed to that procedure, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 276-277 (7th Cir. 1995), and the Third, Fourth, Eighth, and Eleventh Circuits—unlike the court below—have enforced arbitration agreements despite the unavailability of class action procedures under those agreements. *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638-639 (4th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3191 (Sept. 12, 2002) (No. 02-424); *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720 (8th Cir. 2001); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 817-818 (11th Cir. 2001); *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). The decision below likewise conflicts with the decisions of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, all of which have reached the related conclusion that the Arbitration Act precludes courts from requiring *consolidation* of arbitration proceedings unless the parties expressly provided for such procedures in their arbitration agreements.

Second, the Court of Appeal's decision squarely conflicts with the decisions of this Court. S. Ct. Rule 10(c). This Court has repeatedly emphasized the preemptive power of the Arbitration Act, and has repeatedly admonished, as the Act itself makes plain, that arbitration agreements must be enforced according to their terms—even when enforcement of the agreement results in piecemeal litigation of the contracting parties' claims. Indeed, this Court has previously recognized that an arbitration agreement may be enforced "even if the arbitration could not go forward as a class action." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (quotation omitted).

Third, the conflict in this case concerns a matter of overriding national importance. S. Ct. Rule 10(c). The Court of Appeal's decision in this case contravenes the central pur-

pose of the Arbitration Act: enforcing arbitration agreements according to their terms. And the conflict between California's approach and that of the rest of the country plainly has nationwide implications. Tens of thousands of standard commercial and consumer contracts contain arbitration provisions. In California and the smattering of other jurisdictions adopting California's minority view, the parties to an arbitration agreement expressly precluding a class arbitration procedure—or an agreement that is silent as to class arbitration—can nonetheless be forced either to arbitrate their claims as a class, or not to arbitrate at all. In the rest of the country, courts enforce arbitration agreements as written, declining to rewrite them to include a class procedure for which the contracting parties did not provide. Thus, parties to standard contracts containing standard arbitration provisions face the prospect of starkly different proceedings arising from those contracts—all depending on whether they sue or are sued in California, or somewhere else.

In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court noted probable jurisdiction to determine whether the California Supreme Court's ruling imposing a class action structure on an arbitration conflicted with the Federal Arbitration Act. But after briefing and oral argument, this Court concluded that it could not exercise jurisdiction over that question because it had not been adequately raised below. *Id.* at 9. The question left open in *Southland* is squarely presented by this case, and the conflict between the California Supreme Court's approach and that of the overwhelming majority of federal and state courts of appeal has only deepened in the intervening years—as is evidenced by the recent proliferation of petitions for certiorari on this and related issues. Certiorari should be granted to resolve, at last, this important question.

STATEMENT OF THE CASE

1. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, "declared a national policy favoring arbitration and withdrew the power of the state to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10. "[M]otivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered," the Act was passed to "ensure judicial enforcement of privately made agreements to arbitrate," placing arbitration agreements "upon the same footing as other contracts." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219, 220 (1985); *see Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (Arbitration Act's "central purpose" is "to ensure 'that private agreements are enforced according to their terms' ") (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

To carry out the Act's central purpose, state and federal courts are instructed to "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter Reynolds*, 470 U.S. at 221 (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 20 (1983)); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987).[1] And under the Supremacy Clause, state laws in conflict with the Act's strong policy in favor of arbitration must give way. *See, e.g., Perry*, 482 U.S. at 484 (finding preempted a California law allowing certain actions to be maintained in court " 'without regard to the existence of any private agreement to arbitrate' ") (quoting Cal. Lab. Code Ann. § 229);

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[1] The "liberal federal policy favoring arbitration agreements" embodied in Section 2 of the Act, *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, applies to state and federal courts alike. *Southland*, 465 U.S. at 11-12; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995).

Southland, 465 U.S. at 11-12 (finding preempted a California law interpreted by state courts to require judicial consideration of claims).

2. When respondent John Szetela opened a credit card account with Discover in 1993, he entered into a Cardmember agreement with Discover governing the terms of their relationship. In 1999, Discover sent Szetela a proposed amendment to the Cardmember agreement, which provided in pertinent part:

> ARBITRATION OF DISPUTES. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.
>
> IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. [App. 2a.]

The agreement entitled Szetela to arbitrate any claims against Discover in the judicial district in which he resides

and to select between two nationally-known arbitration providers. The agreement did not limit the remedies Szetela could obtain in arbitration, and it required Discover, upon Szetela's request, to advance arbitration fees to Szetela. The agreement also capped Szetela's liability for arbitration fees, so that his arbitration expenses would be no greater than if he had brought his claims in court.

Szetela could have rejected the arbitration provision by notifying Discover of his objection and canceling his Discover Card. He did neither. Nor did Szetela object to the arbitration agreement in late 1999, when Discover upgraded his Card to a Platinum Card and sent him a new Cardmember agreement containing an identical arbitration provision.

3. In 2000, a New Jersey resident filed a putative class action against Discover in California state court, raising various tort and contract claims. The complaint was subsequently amended to add Szetela, a California resident, as an additional named plaintiff. Invoking the arbitration agreement, Discover moved to compel arbitration of Szetela's claim. The trial court granted the motion and compelled Szetela to arbitrate his claims against Discover.

Szetela prevailed at arbitration. He also appealed the trial court's order compelling arbitration to the California Court of Appeal, arguing that the arbitration agreement's preclusion of class-wide arbitration should have been stricken. Discover responded, among other things, that the Federal Arbitration Act required courts to enforce agreements according to their terms, even if the result was to preclude parties from bringing or participating in class actions. Resp. Br. 8, 13-15 & n.8, 30.

4. The California Court of Appeal treated Szetela's appeal as a petition for a writ of mandate. App. 1a. Invoking California law, the court considered whether the Cardmember agreement's arbitration provision was procedurally and substantively unconscionable. *Id.* at 6a-9a. Despite evidence

that there were hundreds of credit card issuers in California from whom Szetela could have obtained a credit card—many of whom offered credit cards without arbitration provisions—the Court of Appeal found the arbitration agreement to be procedurally unconscionable because it was presented to Szetela on a "take it or leave it" basis. *Id.* at 7a.

The court next concluded that the arbitration agreement's class action prohibition was substantively unconscionable, because it "contradict[ed] the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general." *Id.* at 8a (citing Cal. Bus. & Prof. Code §§ 17200 *et seq.*). Taking "exception" to the unavailability of the class action procedure, the court opined that the no-class-action provision "was meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money." App. 7a-8a. Without a class action procedure available in arbitration, the court went on, "relatively few, if any, customers will seek legal remedies, and * * * any remedies obtained will only pertain to that single customer without collateral estoppel effect." *Id.* at 8a. The Court of Appeal also concluded that the arbitration agreement's no-class-action provision violated the public policy underlying class actions—"to promote judicial economy and streamline the litigation process"—because it "allow[ed] litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole." *Id.* at 9a.

Because the Court of Appeal did not address Discover's argument that compelling class arbitration contrary to the terms of the parties' arbitration agreement would violate the Federal Arbitration Act, Discover petitioned for rehearing, again arguing that compelling class arbitration in these circumstances would violate the Act. Rehearing was denied. App. 10a.

5. Discover then filed a Petition for Review with the Supreme Court of California, arguing that the Court of Appeal's decision violated the Federal Arbitration Act. Discover argued, as it had below, that by requiring parties to arbitrate on a class-wide basis, regardless of the terms of the arbitration agreement, the Court of Appeal had created a rule that conflicted with, and was preempted by, the Arbitration Act's admonition that agreements be enforced according to their terms. Pet. for Rev. 2, 20-28.

The Supreme Court of California denied Discover's petition for review on July 31, 2002. App. 11a. Rather than be forced to conduct a complicated "class arbitration" on terms to which it had not agreed, Discover proceeded with class litigation in trial court.[2]

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[2] It is difficult to conceive how "class arbitration" could be accomplished without the extensive involvement of a trial judge. A judge must, among other things, define the class, rule on the best form of notice to the class, allow the class to opt out, and monitor the proceedings to ensure that the class is adequately represented and that the issues in play are common to the class. *See Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (acknowledging that court, and not arbitrators, would conduct "arbitral class" certification procedures, monitor representation, approve proposed settlements, and the like), *rev'd in part*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). Because the benefits of arbitration—speed, informality, and efficiency—do not attach when "class arbitration" has been ordered, Discover—rather than straddle arbitral and judicial fora to resolve the claims of the plaintiff class—opted to defend against the class claims in just one forum: state court.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SQUARELY PRESENTS THE QUESTION TAKEN UP, BUT LEFT UNRESOLVED, IN *SOUTHLAND CORP.* v. *KEATING.*

1. In *Keating* v. *Superior Court*, 645 P.2d 1192, 1195 (Cal. 1982), the plaintiff franchisees brought a class action against their franchisor alleging numerous state law claims. The trial court granted Southland's motion to compel arbitration of the plaintiffs' claims and ordered that the arbitration proceed as a "class arbitration"—even though the parties' agreement did not specify that a class procedure was available in arbitration. The California Supreme Court granted review of the question whether the trial court could impose class action procedures on the parties. Advancing the same policy rationales the Court of Appeal identified in this case, the California Supreme Court concluded that the arbitration could go forward as a class proceeding, if the trial court concluded on remand that "gross unfairness" would otherwise result. *Id.* at 1209. Three justices dissented, observing that "[a]rbitration is a matter of agreement," and that the parties' arbitration contracts "do not provide for class arbitration, nor have the parties subsequently agreed thereto." *Id.* at 1214.

This Court noted probable jurisdiction over the question "whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts." *Southland*, 465 U.S. at 3.[3] But after briefing and argument, this Court dismissed that question for lack of

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[3] The Court reversed the California Supreme Court on the second of the two questions over which the Court had noted probable jurisdiction: whether California's Franchise Investment Law precluded parties from arbitrating claims arising under the law. The California Supreme Court had held in *Keating* that it did; invoking again the preemptive force of the Act's animating purpose, this Court held in *Southland* that it did not.

jurisdiction, finding that the class arbitration procedure had been challenged below on state law grounds only. *Id.* at 9.

In the intervening two decades, California courts have built on the California Supreme Court's decision in *Keating*, regularly imposing classwide arbitration without regard to the terms of the parties' arbitration agreements.[4] The federal courts of appeal—along with the great majority of federal district courts and state appellate courts—have in the meantime taken a different path. *See infra* at 13-20.

2. This case raises the same question left unanswered in *Southland*—with an even more compelling twist. The parties' arbitration agreement in *Southland* was silent as to whether class action procedures were available in arbitration. Discover's arbitration agreement with Szetela expressly *precluded* class action procedures. The California Court of Appeal therefore did not just import new procedural terms into the agreement, as in *Keating*; it struck and rewrote the terms that were already there. Thus, under California's *Keating* rule as expanded by *Szetela*, class arbitration is available in California *whenever* the parties agree to arbitrate, *whatever* their agreement actually says about arbitral procedures. California accordingly requires parties to an arbitration agreement to submit to class-wide or representative arbitration, regardless of what their contract says—or forgo arbitration altogether.

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[4] *See, e.g., Sanders* v. *Kinko's Inc.*, 121 Cal. Rptr. 2d 766 (Cal. Ct. App. 2002); *Blue Cross of Cal.* v. *Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Izzi* v. *Mesquite Country Club*, 231 Cal. Rptr. 315 (Cal. Ct. App. 1986); *Lewis* v. *Prudential Bache Secs., Inc.*, 225 Cal. Rptr. 69 (Cal. Ct. App. 1986); *Anesthesia Care Assocs. Med. Group, Inc.* v. *Blue Cross of Cal.*, 2002 WL 484662 (Cal. Super. Ct. Feb. 25, 2002).

This case does not suffer from the jurisdictional impediments to review that surfaced in *Southland*. The question whether the Federal Arbitration Act precluded the state court from engrafting class procedures onto the parties' arbitration agreement was raised below. The trial court concluded that federal law supported its ruling compelling arbitration. *See* Trial Tr. 15, lines 14-17 (May 1, 2001). On Szetela's appeal, Discover explained in its responsive brief that the Act preempted the court from rewriting the parties' arbitral bargain. Resp. Br. 8, 13-15 & n.8, 30. When the Court of Appeal ignored the issue in its opinion, Discover sought rehearing on the federal question. Pet. for Reh. 3-16. When the Court of Appeal denied rehearing, Discover filed a petition for review with the California Supreme Court, arguing, among other things, that the federal Act required the state court to enforce the parties' agreement according to its terms. Pet. for Rev. 2, 20-28. The issue was amply preserved for review. *See Clark* v. *Jeter*, 486 U.S. 456, 459-460 (1988).

Nor does the Court of Appeal's couching its ruling on "unconscionability" grounds blunt the Arbitration Act's preemptive force. Section 2 of the Act provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686-687 (1996). But while the Arbitration Act permits parties to resist enforcement of their arbitration agreements based upon generally-applicable state-law contract defenses—including unconscionability—it does not grant a state court license to invalidate an agreement simply by declaring it to be in tension with an otherwise-preempted state policy, and thus "unconscionable." Further, as the Court explained in *Perry*, 482 U.S. at 493 n.9, a court "may not * * * in assessing the rights of litigants to enforce an arbitration agreement, * * * rely on the uniqueness of an agreement to arbitrate as a

basis for a state-law holding that enforcement would be unconscionable." That is exactly what the California Court of Appeal did here; it assessed the arbitration agreement's special procedures and the nonpreclusive effect of arbitral rulings, and declared the agreement's no-class-action provision "unconscionable" as against California policy. Section 2's limited contract-law safe harbor does not apply here.

II. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE DECISIONS OF EVERY FEDERAL CIRCUIT TO HAVE ADDRESSED THE ISSUE.

The rule created by the California Court of Appeal—which forces parties to an arbitration agreement, no matter what the terms of the agreement, to arbitrate as a class or not at all—squarely conflicts with the decisions of all the federal courts of appeal to have considered the issue. Those decisions uniformly have stated that courts may not impose class arbitration unless the parties' arbitration agreement expressly provided for that procedure, and uniformly have enforced arbitration agreements containing no-class-action provisions.

1. In *Champ* v. *Siegel Trading Company*, 55 F.3d at 271, the Seventh Circuit held that "absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration." Analogizing to multiple circuit court decisions holding that a court may not order consolidated arbitration where the parties' arbitration agreement did not provide for that procedure, *see infra* at 17-18, the court of appeals concluded that it would not "order[] class arbitration where the parties' arbitration agreement is silent on the matter." *Id.* at 275.

As the *Champ* court explained, parties to an arbitration agreement " 'relinquish certain procedural niceties which are normally associated with a formal trial.' " *Id.* at 276 (quoting *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980)). "One of

those 'procedural niceties' is the possibility of pursuing a class action." *Champ*, 55 F.3d at 276-277.[5] The court of appeals acknowledged the plaintiffs' "complain[t] that various inefficiencies and inequities will result from denying them the opportunity to pursue arbitration on a class basis." *Id.* But it held that "[w]hile that may or may not be the case, * * * the Supreme Court has repeatedly emphasized that we must rigorously enforce the parties' agreement as they wrote it, 'even if the result is piece-meal litigation.' " *Id.* (quoting *Dean Witter Reynolds*, 470 U.S. at 221). Accordingly, the Seventh Circuit "enforce[d] the type of arbitration to which these parties agreed, which does not include arbitration on a class basis." *Champ*, 55 F.3d at 277.

2. The federal courts of appeal that have subsequently spoken on the class arbitration issue all have followed *Champ*'s lead. In *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d at 728, for example, the court of appeals affirmed a district court ruling compelling individual arbitration of the plaintiffs' claims. Citing the same precedents on which the *Champ* court relied, the Eighth Circuit acknowledged that its ruling might not "effect the most expeditious resolution of claims," but it properly elevated the contracting parties' intent over its own notions of economy: where "the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals." *Id.* at 728-729.

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[5] Even the Court of Appeal in this case acknowledged that the class action is a "procedural mechanism." App. 9a. *See also Caudle* v. *American Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to *be* in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants.") (emphasis in original).

Similarly, in *Johnson* v. *West Suburban Bank*, 225 F.3d at 377 n.4, a case involving claims brought under the federal Truth In Lending Act (TILA), the Third Circuit cited *Champ* in observing that "it appears impossible [to pursue class arbitration] unless the arbitration agreement contemplates such a procedure." Despite the presumed unavailability of class procedures in arbitration, the court of appeals enforced the parties' arbitration agreement, reversing the contrary decision of the district court. As the Third Circuit noted, echoing *Champ*, "the right to proceed as a class * * * is merely a procedural one * * * that may be waived by agreeing to an arbitration clause." *Id.* at 369.

Agreeing with the Third Circuit's decision in *Johnson*, the Eleventh Circuit in another TILA case, *Randolph* v. *Green Tree Financial Corp.*, 244 F.3d at 819, held that a "contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures." *See also Snowden* v. *Checkpoint Check Cashing, Inc.*, 290 F.3d at 638-639 (citing *Johnson*, rejecting public policy arguments against no-class-action provision in arbitration agreement, and finding provision not unconscionable); *Deiulemar Compagnia de Navigazione S.p.A.* v. *M/V Allegra*, 198 F.3d 473 (4th Cir. 1999) (finding that where the parties' agreement did not provide for class arbitration, " 'the FAA has already provided the type of procedure to be followed in this case, namely, nonclass arbitration' ") (quoting *Champ*, 55 F.3d at 276), *cert. denied*, 529 U.S. 1109 (2000); *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 509 (7th Cir. 1999) (citing *Champ*, and noting that "[b]ecause arbitration is based fundamentally on an agreement between the parties, [a Rule 23 class action] is normally unavailable in arbitration").

Numerous federal district courts[6] and state courts of appeal[7] likewise have held, contrary to the California Court of Appeal, that courts may not compel class arbitration where

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[6] *See, e.g.*, *Gray* v. *Conseco, Inc.*, 2001 WL 1081347, at *3 (C.D. Cal. Sept. 6, 2001); *Zawikowski* v. *Beneficial Nat'l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *McCarthy* v. *Providential Corp.*, 1994 WL 387852, at *9 (N.D. Cal. July 19, 1994), *appeal dismissed*, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998); *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994).

The great majority of district courts have also rejected the notion that a no-class-action provision renders an arbitration agreement "unconscionable." *See, e.g.*, *Lomax* v. *Woodmen of the World Life Ins. Soc.*, ___ F. Supp. ___, 2002 WL 31455600, at *3 (N.D. Ga. July 16, 2002) ("Generally, prohibiting class-wide arbitration does not render an otherwise valid arbitration clause unconscionable") (citing *Gilmer*, 500 U.S. at 32); *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002); *Bischoff* v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1107-09 (C.D. Cal. 2002); *Vigil* v. *Sears Nat. Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002); *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1194-95 (S.D. Cal. 2001); *Pick* v. *Discover Fin. Servs.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) ("it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions") (citing *Gilmer*, 500 U.S. at 32).

[7] *See, e.g.*, *Gras* v. *Associates First Cap. Corp.*, 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001) (enforcing "no class action" provision in arbitration agreement), *cert. denied*, 794 A.2d 184 (N.J. 2002); *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App.) (FAA preempts state law favoring class), *appeal denied* (Nov. 19, 2001); *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001)(relying on *Champ* and refusing to compel class arbitration where parties' agreement was silent); *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9, 20 (Ala. 1998) ("to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration").

the parties' arbitration agreement did not provide for that procedure.

3. The California Court of Appeal's decision also conflicts with the decisions of six circuits to have addressed the related question whether arbitration proceedings can be *consolidated* absent an express agreement to do so. The Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have held that a court may not order consolidation of arbitration claims unless the contract expressly permits that procedure.[8] Those

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[8] *Government of the United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (court cannot consolidate arbitration proceedings "absent the parties' agreement to allow such consolidation") *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings * * * when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) ("Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in."); *see also Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) ("under § 4 of the [FAA] the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.) (noting that "the only issue properly before this Court is whether [the parties] are parties to a written agreement providing for consolidated arbitration," and holding consolidation is not allowed absent such agreement), *cert. denied*, 469 U.S. 1061 (1984). *But cf. Connecticut General Life Ins. Co.* v. *Sun Life Assurance Co. of Canada*, 210 F.3d 771, 776 (7th Cir. 2000) (authorizing consolidated arbitration based on "practical and textual" considerations); *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 6 (1st Cir. 1988) (holding that arbitrations may be consolidated when the agreement is silent on the

decisions uniformly recognize—just as the *Champ* line does—that "a court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly inefficient maintenance of separate proceedings." *American Centennial Ins.*, 951 F.2d at 108; *see United Kingdom*, 998 F.2d at 73 (same); *Baesler*, 900 F.2d at 1195. And as to the arguments that swayed the Court of Appeal—that multiple arbitrations may result in inconsistent determinations or cause other procedural problems—those decisions have responded that "[a]lthough these concerns may be valid concerns of the [parties], they do not provide us with the authority to reform the private contracts which underlie this dispute." *United Kingdom*, 998 F.2d at 74; *American Centennial Ins.*, 951 F.2d at 108. The Seventh Circuit relied on these authorities to reach its holding in *Champ*, observing that there is no meaningful basis for "distinguish[ing] between the failure [of an arbitration agreement] to provide for consolidated arbitration and class arbitration." 55 F.3d at 275. *See also Gammaro*, 828 F. Supp. at 674 (analogizing consolidated arbitration to class-wide arbitration); *McCarthy*, 1994 WL 387852, at *9 (same).

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issue and state law specifically provides for consolidation, over dissenting Judge Selya's objection that "[b]y fashioning an arbitral clause which omits reference to consolidation, the parties have made a choice. By imposing consolidation *ab extra*, the majority trumps that choice."), *cert. denied*, 489 U.S. 1077 (1989).

4. On the other side of the ledger, a few district courts[9] and some state courts of appeal[10] have adopted the California view, imposing class action procedures on arbitration agreements that are either silent as to such procedures or that expressly preclude them. That minority approach reflects a sharply divergent view of the policy behind and preemptive force of the Arbitration Act. Under the view of *Champ* and the many cases adopting its approach, the Arbitration Act's policy requiring enforcement of arbitration agreements according to their terms precludes class-wide procedures unless the parties expressly agree to them. Under the minority view, classwide arbitration procedures are always available—no matter what the parties' contract says. The majority approach furthers the Arbitration Act by enforcing the parties' choice of arbitral procedures; the minority approach

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[9] *See Comb* v. *PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175-76 (N.D. Cal. 2002) (citing *Szetela*); *Acorn* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171 (N.D. Cal. 2002) (citing *Szetela*); *Luna* v. *Household Fin. Corp.*, ___ F. Supp. 2d ___, 2002 WL 31487425, at *8 (W.D. Wash. Nov. 4, 2002) (citing *Szetela*); *Lozada* v. *Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000) (relying on district court decision in *Johnson*, later reversed by the Third Circuit); *cf. Ting* v. *AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002) (finding no-class-action provision unconscionable in case not implicating the Arbitration Act).

[10] *See, e.g., Leonard* v. *Terminix Int'l Co.*, ___ So. 2d ___, 2002 WL 31341084, at *5-6 (Ala. Oct. 18, 2002) (finding no-class-action provision unconscionable and unenforceable, and citing *Keating*); *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 360 (S.C. 2002) ("adopt[ing] the approach taken by the California courts" and approving class-wide arbitration), *petition for cert. filed*, 71 U.S.L.W. 3320 (Oct. 23, 2002) (No. 02-364); *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265, 280 (W. Va. 2002) (finding "unconscionable" arbitration agreement's prohibition on punitive damages and class action relief), *petition for cert. filed*, 71 U.S.L.W. 3163 (Aug. 27, 2002) (No. 02-315).

undermines the animating intent of the Act by empowering courts to impose arbitral procedures contrary to the will of the contracting parties.

III. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The need for plenary review of the Court of Appeal's decision is heightened further by the fact that it conflicts with this Court's own decisions. *See* S. Ct. Rule 10(c). This Court repeatedly has ruled in favor of enforcing agreements to arbitrate—even when the result is "piecemeal" litigation. *Dean Witter Reynolds*, 470 U.S. at 221 (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. at 20). In *Dean Witter Reynolds*, this Court in plain terms "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." 470 U.S. at 219. The Act mandates the enforcement of contracts to arbitrate, no more and no less, and this Court has strongly cautioned more than once that courts must not "allow the fortuitous impact of the Act on efficient dispute resolution to overshadow" that central purpose of the legislation. *Id.* at 220. As the Court put it in *Moses H. Cone Memorial Hospital*, "the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." 460 U.S. at 20 (emphasis in original).

In keeping with its repeated admonition that the intent of the parties to an arbitration agreement trumps alleged notions of procedural efficiency, this Court has strongly signaled its preference for enforcing agreements to arbitrate, even if enforcement results in the preclusion of a class action. *Gilmer*, 500 U.S. at 32. The *Gilmer* Court addressed whether claims arising under the Age Discrimination in Employment Act (ADEA) could be arbitrated, and found that they could. One of Gilmer's arguments against arbitration of his ADEA claims was that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not

provide for * * * class actions." *Id.* at 32. This Court rejected that argument, observing that " 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Id.* (quoting *Nicholson* v. *CPC Int'l, Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). The lower courts since *Gilmer* that have adopted the *Champ* majority view—declining to impose class procedures on an arbitration where the parties' agreement provided for no such thing—repeatedly have invoked this passage as additional support for their holding. *See, e.g.*, *Randolph*, 244 F.3d at 816-817; *Johnson*, 225 F.3d at 377; *see also Snowden*, 290 F.3d at 639.

The California Court of Appeal's decision thus stands in conflict not just with the raft of court of appeals cases to have addressed class arbitration and consolidation issues, but also with *Gilmer* and with each of this Court's cases emphasizing the Act's "central purpose" of enforcing arbitration agreements "according to their terms." *Mastrobuono*, 514 U.S. 53-54 (internal quotation omitted).

IV. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. When it took up in *Southland* the question whether the California Supreme Court had erred in precluding resolution in arbitration of certain state statutory claims, this Court observed that the state court's decision, if allowed to stand without immediate review, would "seriously erode federal policy" favoring arbitration agreements: "Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration." 465 U.S. at 7 (internal quotation omitted). So too here. The

parties to the arbitration agreement in this case agreed to arbitrate their claims. They did not agree to class arbitration procedures; indeed, their agreement specifically disallowed such procedures. The California court's decision, which deletes a term of the parties' contract, strikes directly at the core purpose of the Arbitration Act: to enforce arbitration agreements according to their terms. The question presented here is plainly of national importance.

2. The California Court of Appeal's decision also substantially undermines the other ancillary benefits of the Arbitration Act. When a party agrees to arbitrate a dispute, it waives a wide range of procedural rights and protections that it would otherwise be entitled to claim in a judicial proceeding. Most notable among them is the most basic: a party who agrees to arbitrate waives the right to bring his claim in a judicial forum. Smaller waivers, too, are so common as to be presumed: one who agrees to arbitrate waives certain discovery proceedings, agrees to relaxed or otherwise altered rules of evidence, and accepts limited grounds for appeal. *See Gilmer*, 500 U.S. at 31-32. Thus, when a party agrees to arbitrate, he "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). *See also Allied-Bruce Terminix*, 513 U.S. at 280 (noting, among "[t]he advantages of arbitration," that "it is usually cheaper and faster than litigation [and] can have simpler procedural and evidentiary rules").

Yet California's rule—that classwide arbitration may be imposed when the parties agree to arbitrate, even if the parties expressly preclude classwide arbitration in their contract—creates a non-waivable right to a class *procedure*, utterly flouting the commonly accepted view that such procedural rights are readily waivable. *See Champ*, 55 F.3d at 276. And in the same vein, the California rule substantially undermines arbitration's "simplicity, informality and

expedition." *Mitsubishi*, 473 U.S. at 628. Indeed, it is difficult to imagine an alteration to an arbitration proceeding more fundamentally at odds with arbitration's strengths than engrafting a messy class action procedure onto it. But after the Court of Appeal's decision, parties to arbitration agreements in California are faced with the prospect of entanglement with the very thing they bargained to avoid—and which the Arbitration Act allows them to avoid—costly and complicated litigation in a judicial, or semi-judicial, forum. *See supra* n.2. That is inimical to the purpose of arbitration.

3. The split among the courts also may lead to markedly different arbitral proceedings arising from a single standard arbitration agreement—all depending on where the parties sue or are sued. In California or another jurisdiction that follows the minority rule, a party to a standard commercial arbitration contract that precludes, or is silent on, class arbitration, may nonetheless force its opponent to arbitrate or litigate claims against a class. A plaintiff seeking arbitration under that same agreement in one of the majority jurisdictions, however, will be held to the terms of its agreement and be required to arbitrate individually. Those conflicting results will inexorably lead to forum-shopping on a massive scale—to the extent they have not already. *See supra* at 7 (noting that the original plaintiff in this case, hailing from New Jersey, sued Discover in California court).[11]

4. Finally, the question whether and to what extent parties to an arbitration agreement may curtail their arbitral rights and remedies is presently a particularly active front of

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[11] The nationwide class ultimately certified by the trial court includes many cardholders who do not live in California, and whose home states would presumably enforce the Delaware choice-of-law provision in the parties' arbitration agreement. Delaware courts have upheld no-class-action provisions. *See Lloyd* v. *MBNA Amer. Bank*, 2001 WL 194300, *3-4 (D. Del. Feb. 3, 2001), *aff'd*, 27 Fed. Appx. 82 (3d Cir. 2002).

litigation. On October 15, this Court granted certiorari to consider whether a court may refuse to compel arbitration of claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), where the parties' arbitration agreement waived any right to punitive damages. *Pacificare Health Sys., Inc.* v. *Book*, 123 S. Ct. 409 (2002). Where the *Pacificare* case presents the question whether parties to an arbitration may waive certain remedies, this case asks whether parties to an arbitration may agree to forgo certain arbitral *procedures*.

That question equally warrants review by this Court—as other recent filings testify.[12] A pending petition for certiorari to the West Virginia Supreme Court asks whether the Federal Arbitration Act permits a state court to refuse to enforce an arbitration agreement that precluded punitive damages (the question in *Pacificare*) as well as class-action arbitrations (the question here). *Friedman's Inc.* v. *West Virginia*, 71 U.S.L.W. 3163 (Aug. 27, 2002) (No. 02-315). And on October 23, 2002, a petition for certiorari was filed in *Green Tree Financial Corp.* v. *Bazzle*, No. 02-634, presenting a

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[12] Commentators, too, have noted the sharp divergence in views regarding the propriety of imposing class proceedings on arbitrating parties. *See* Carroll E. Neesemann, *Should an Arbitration Provision Trump the Class Action? YES: PERMITTING COURTS TO STRIKE BAR ON CLASS ACTIONS IN OTHERWISE CLEAN CLAUSE WOULD DISCOURAGE USE OF ARBITRATION*, 8 No. 3 Disp. Resol. Mag. 13, 17 (2002); Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? NO: PERMITTING COMPANIES TO SKIRT CLASS ACTIONS THROUGH MANDATORY ARBITRATION WOULD BE DANGEROUS AND UNWISE*, 8 No. 3 Disp. Resol. Mag. 13, 21 (2002); Alan S. Kaplinsky, *Arbitration and Class Actions—A Contradiction in Terms*, 1302 PLI/Corp 7 (2002); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, And Clarifying Arbitration Law*, 2001 J. Disp. Resol. 1, 15 (noting "the hotly debated issue of class-action arbitrations").

question substantially similar to this one: "Whether the Federal Arbitration Act prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration." 71 U.S.L.W. 3320.

These issues have percolated in the lower courts for twenty years, ever since the California Supreme Court's decision in *Keating*. To this day California's minority view persists; and it is still, more than ever, in the minority. Certiorari should be granted in this case and the decision of the California Court of Appeal reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G029323
(Super. Ct. No. OOCC12582)

JOHN SZETELA,
Plaintiff and Appellant,

v.

DISCOVER BANK,
Defendant and Respondent.

Filed April 22, 2002

OPINION

Appeal from an order of the Superior Court of Orange County, Stuart T. Waldrip, Judge. Appeal treated as a petition for a writ of mandate, and petition granted.

* * *

In this putative class action, plaintiff John Szetela challenges an order granting Discover Bank's (Discover) motion to compel arbitration. Szetela argues the arbitration agreement, to the extent it prohibits class treatment of small individual claims, is unconscionable and unenforceable. We

agree and therefore issue a writ of mandate directing the trial court to strike the portion of the arbitration clause prohibiting class or representative actions.

I

FACTS AND PROCEDURAL BACKGROUND

Szetela opened a Discover credit card account in July 1993. The terms of his account were governed by a Cardmember Agreement. In July 1999, Discover sent Szetela a notice inserted inside his billing statement that purported to amend the terms of the Cardmember Agreement to include an arbitration clause.

In relevant part, the amendment states: "**ARBITRATION. WE ARE ADDING A NEW SECTION TO READ AS FOLLOWS: [¶] ARBITRATION OF DISPUTES.** In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration. [¶] IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit,

and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision."

If Szetela did not wish to accept the terms of the amendment, his only option was to notify Discover, which would then close his account. If he had selected this option, he would have been permitted to pay his remaining balance under the terms of the Cardmember Agreement prior to the amendment.

Szetela was not the original named plaintiff in this case. In October 2000, James Shea, a New Jersey resident, filed the present action against Discover as a putative class action. Discover filed a motion in New Jersey seeking relief that would effectively bar the California action.[1] In December 2000, a first amended complaint was filed adding Szetela, a California resident, as an additional named plaintiff. The amended complaint asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent or negligent misrepresentation, and deceptive business practices. These claims were based on alleged practices by Discover that resulted in cardholders being improperly charged fees for exceeding their credit limits ("overlimit fees") and incurring other penalties: (1) incorrectly stating the cardholder's "available credit" amount on their monthly statements, and (2) incorrectly calculating cardholders' "minimum payment due" on their monthly statements. Discover's overlimit fee was $29.

Based on the arbitration clause purportedly added to Szetela's Cardholder Agreement in 1999, Discover moved to compel arbitration of Szetela's claim on an individual basis. The court granted the motion, and Szetela eventually prevailed at arbitration, recovering $29, and then filed the present appeal. Discovery was also conducted to locate a new class representative, a person to whom the arbitration clause did not apply. A second amended complaint adding a new class representative was subsequently filed.

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[1] Discover lost the motion. The trial court's subsequent opinion is the subject of a request for judicial notice, see *post*, section II.B.

II

DISCUSSION

A. Discover's Motion to Dismiss

A threshold issue is whether this court has jurisdiction to hear Szetela's appeal. Discover argues that we do not and has moved to dismiss the appeal on the ground that an order compelling arbitration is not appealable. (See, e.g., *Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591.) Szetela argues that the order to arbitrate signaled the "death knell" of the putative class action and is therefore appealable. The death knell doctrine permits the appellate court to review an order denying a motion to certify a class when it is unlikely the case will proceed as an individual action. (See, e.g., *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

Both sides raise valid points. Discover argues the death knell doctrine generally applies only in the context of a trial court's denial of a motion to certify a class. Szetela points out that although the court's order does not signal the death knell for the entire class, it does sharply limit the scope of the class to those not facially bound by the "no class action" provision. This alone, however, is not sufficient to create appellate jurisdiction.

Discover suggests the proper procedure is an appeal from an order on a motion to confirm or vacate the arbitrator's award. Yet Szetela, obviously, does not want to confirm the award, and grounds to vacate are extremely limited. (See Code Civ. Proc., § 1286.2.) It is not in Discover's interest to create an appealable order. Therefore, although the order is not appealable under the death knell doctrine, because of the unusual circumstances present here, we exercise our discretion to treat the appeal as a petition for a writ of mandate. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 401; *Rogers v. Municipal Court* (1988) 197 Cal.App.3d 1314, 1317.) Unless we do so, this issue will effectively evade appellate review, establishing the lack of an adequate remedy of law necessary for a writ. The essential facts are undisputed and

the case has been extensively briefed. The motion to dismiss is denied, and we therefore consider the merits of the case.

B. Szetela's Requests for Judicial Notice

Szetela requests that we take judicial notice of a trial court opinion in a parallel case in New Jersey. As part of the record in the court of another state, we have discretion to take judicial notice of the opinion. (Evid. Code, § 452, subd. (d).) Discover apparently fears that if we take judicial notice of the opinion, we will unquestioningly adopt its findings, which is not the case. Szetela's request is granted; however, the opinion will be given the weight appropriate to an out-of-state trial court decision.

Szetela further requests that we take judicial notice of a document purporting to be Citibank's recently amended credit card agreement. This document includes a no class action provision similar to Discover's amendment. Because this issue is not relevant to our decision in this appeal, we decline to do so. (See *People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.) The request is denied.

C. Enforceability of the Arbitration Clause

The essence of Szetela's argument is that the no class action provision is unconscionable and should not be enforced.[2] Because no material facts are in dispute, we review the enforceability of the arbitration clause de novo. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

An agreement to arbitrate is enforceable unless a recognized contract defense, such as unconscionability, exists. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 686-687.) As our Supreme Court has noted, "under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Citations.]" (*Armendariz v. Foundation Health Psychcare*

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[2] We do not rule on the arbitration clause as a whole, merely that portion of it prohibiting class or representative actions.

Services, Inc. (2000) 24 Cal.4th 83, 98, fn. omitted (hereafter *Armendariz*).) Unconscionability is one such ground. (Civ. Code, § 1670.5, subd. (a).)

Szetela, as the party opposing arbitration, has the burden of proving the arbitration provision is unconscionable. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) Unconscionability includes both substantive and procedural elements.[3] (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1531.) Procedural unconscionability addresses the manner in which agreement to the disputed term was sought or obtained, such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212-1213.) Substantive unconscionability addresses the impact of the term itself, such as whether the provision is so harsh or oppressive that it should not be enforced. (*Ibid.*) These elements, however, need not be present to the same degree. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114.)

1. Procedural Unconscionability

Discover argues that a contract provision lacks procedural unconscionability unless the opposing party can demonstrate that no meaningful opportunity existed to obtain the offered goods or services from any other provider without the offending contract term. We disagree this is the relevant test for unconscionability. The availability of similar goods or services elsewhere may be relevant to whether the contract is

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[3] Szetela primarily argues California and federal cases in support of his argument regarding unconscionability. Discover states the Discover Cardmember Agreement is governed by Delaware law, but argues that Discover should prevail under either state's law. As Discover has not established the law of another state should apply, we apply California law to our analysis. To the extent Delaware law is more favorable, Discover has waived this argument by failing to brief the choice of law issue.

one of adhesion, but even if the clause at issue here is not an adhesion contract, it can still be found unconscionable. Moreover, "in a given case, a contract might be adhesive even if the weaker party could reject the terms and go elsewhere. (Citation.)" (*Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 827.) Therefore, whether Szetela could have found another credit card issuer who would not have required his acceptance of a similar clause is not the deciding factor.

Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position. When the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present. (See *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) These are precisely the facts in the case before us. Szetela received the amendment to the Cardholder Agreement in a bill stuffer, and under the language of the amendment, he was told to "take it or leave it." His only option, if he did not wish to accept the amendment, was to close his account. We agree with Szetela that the oppressive nature in which the amendment was imposed establishes the necessary element of procedural unconscionability.

2. Substantive Unconscionability

Substantive unconscionability addresses the fairness of the term in dispute. Substantive unconscionability "traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." (*24 Hour Fitness, Inc. v. Superior Court, supra*, 66 Cal.App.4th at p. 1213.) The manifest one-sidedness of the no class action provision at issue here is blindingly obvious.

Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly

meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the $29 sought by Szetela. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.

While adhesive arbitration provisions are not per se unconscionable, "there may be arbitration provisions which do give an advantage to one party. . . . In those cases . . . it is not the requirement of arbitration alone which makes the provision unfair but rather the . . . manner in which the arbitration is to occur." (*Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 Cal.App.3d 208, 216, fn. 7, disapproved on other grounds in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407.) It is the *manner* of arbitration, specifically, prohibiting class or representative actions, we take exception to here. The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness.

While the advantages to Discover are obvious, such a practice contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof. Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it

seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover's business practices. This is not only substantively unconscionable, it violates public policy by granting Discover a "get out of jail free" card while compromising important consumer rights.

Furthermore, the clause violates public policy in another important way. One of the policy reasons for class actions is to promote judicial economy and streamline the litigation process in appropriate cases. To allow litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole is no more appropriate than contracting away the right to bring motions in limine, seek directed verdicts, or use other procedural devices that allow the courts to operate in an efficient manner.

III

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its order directing Szetela to arbitrate his claim, and to enter a new order striking the provision prohibiting representative or class actions from the arbitration clause. Szetela shall recover his costs.

MOORE, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.

APPENDIX B

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G029323
(Sup. Ct. No. OOCC12582)

JOHN SZETELA,
Plaintiff and Appellant,

v.

DISCOVER BANK,
Defendant and Respondent.

Filed May 16, 2002

ORDER

The petition for rehearing is DENIED.

MOORE, J.
MOORE, J.

WE CONCUR:

SILLS, P.J.
SILLS, P.J.

RYLAARSDAM, J.
RYLAARSDAM, J.

APPENDIX C

Court Of Appeal, Fourth Appellate District
Division Three – No. G029323

S107248

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOHN SZETELA, Plaintiff and Appellant,

v.

DISCOVER BANK, Defendant and Respondent.

Filed: July 31, 2002

Petition for review DENIED.

Brown, J., was absent and did not participate.

Chin, Jr., was recused and did not participate.

GEORGE
Chief Justice

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 21, 2002

Mr. John G. Roberts Jr.
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: Discover Bank
v.
John Szetela
Application No. 02A325

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 21, 2002, extended the time to and including November 28, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: /s/
Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. John G. Roberts Jr.
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Mr. Brian R. Strange
12100 Wilshire Blvd.
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Los Angeles, CA 90025

Clerk
Court of Appeal of California,
Fourth Appellate District
750 B Street
3rd Floor
San Diego, CA 92101

Supreme Court U.S.
FILED
JAN 2 2003
OFFICE OF THE CLERK

No. 02-829

In the

Supreme Court of the United States

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

Brian R. Strange
Counsel of Record
Strange & Carpenter
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Los Angeles, CA 90025
(310) 207-5055
Attorneys for Respondent

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

QUESTION PRESENTED

Whether the California Court of Appeal properly applied state law relating to unconscionability of contracts in ruling that the "no class action" provision in Discover Bank's ("Discover") arbitration clause is unconscionable and unenforceable under the specific facts and circumstances of this case.

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-respondent in the court below, is Discover Bank.

Respondent is John Szetela, plaintiff-appellant in the court below.

James Shea and Barbara Hernandez are also named plaintiffs in the trial court proceedings below, although they were not appellants in the California Court of Appeal case, and they are not respondents herein. In addition, Barbara Hernandez has been appointed as a representative of a certified class of plaintiffs, consisting of former and current Discover cardholders.

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OPINION BELOW

The opinion of the California Court of Appeal is reported at 97 Cal. App. 4th 1094, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002), and is reprinted in the Petitioner's Appendix ("Pet. App.") at 1a. The order of the California Supreme Court denying Discover's petition for review is not reported; it is reprinted at Pet. App. 12a.

JURISDICTION

The California Court of Appeal issued its decision on April 22, 2002. Pet. App. 1a. The California Court of Appeal denied Discover's petition for rehearing on May 16, 2002. Pet. App. 10a. The California Supreme Court denied Discover's petition for review on July 31, 2002. Pet. App. 11a. On October 21, 2002, Justice O'Connor entered an order extending Discover's time to file this Petition for a Writ of Certiorari until November 28, 2002. Discover contends that this Court has jurisdiction under 28 U.S.C. section 1257, but plaintiff/respondent John Szetela ("Szetela") disputes that this Court has jurisdiction over this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Discover contends that this case involves questions arising under the Supremacy Clause of the United States Constitution [U.S. Const., art. VI, cl. 2.] and section 2 of the Federal Arbitration Act [9 U.S.C. section 2]. Szetela disputes that this case implicates either of these provisions. Rather, this case involves only state common law of unconscionability of contracts.

INTRODUCTION AND SUMMARY OF ARGUMENT

In order to pique this Court's interest, petitioner Discover attempts to characterize the question on this Petition for a Writ of Certiorari as whether the California Court of Appeal decision in Szetela v. Discover Bank, 97 Cal. App. 1094 (2002) (hereinafter, "Szetela") "conflicts" with federal law, including the Federal Arbitration Act ("FAA") and federal case law. However, the Szetela decision has nothing to do with federal law. While Szetela does involve an arbitration agreement subject to the FAA, the question in Szetela involved state unconscionability law. The law is clear, and this Court has expressly stated, that state law contract defenses, including unconscionability, are applicable to arbitration clauses governed by the FAA, to the same extent that they are applicable to other contracts. There is nothing in the FAA or federal law which prevents a state court from applying state unconscionability law to find a portion of an arbitration agreement subject to the FAA unconscionable. This is all that the California Court of Appeal in Szetela did. Therefore, no "conflict" with federal law is created as a result of the California Court of Appeal's finding that, under the specific facts and circumstances of this case, Discover's arbitration agreement is unconscionable insofar as it purports to preclude classwide relief. There is simply no question of federal law, let alone a compelling question of federal law or a "conflict" with federal law, justifying review by this Court. Discover's Petition for a Writ of Certiorari should be denied.

BRIEF IN OPPOSITION STATEMENT

1. On October 19, 2000, plaintiff James Shea, a New Jersey resident, brought this action on behalf of himself and a class of persons who have been improperly charged overlimit fees by Discover. On December 15, 2000, plaintiff filed a

first amended complaint, adding John Szetela, a California resident, as an additional representative plaintiff. 1

2. The relevant facts relating to John Szetela's Discover credit card agreement are as follows: John Szetela opened his credit card account with Discover in July 1993, at which time Discover sent Mr. Szetela a Cardmember Agreement governing his account. In September 1999, Discover purported to "amend" the agreement to add an arbitration clause. The newly added arbitration section provides as follows:

> "ARBITRATION. WE ARE ADDING A NEW SECTION TO READ AS FOLLOWS:

ARBITRATION OF DISPUTES. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE- HEARING DISCOVERY RIGHTS AND POST- HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE

---

[1] While the merits of this case are not at issue on this Petition for a Writ of Certiorari, it is important to note that, while the class damages are substantial in the aggregate, each class member's individual damages are very small.

SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY."

(underline emphasis added).

3. Based on this arbitration clause, on January 16, 2001, Discover filed a Motion to Compel Arbitration of Plaintiff John Szetela's Individual Causes of Action and to Stay Further Proceedings. The trial court reluctantly granted Discover's motion.

4. John Szetela individually arbitrated his claims against Discover and was awarded the entire amount of his individual claim, $29.00, plus costs.

5. John Szetela also timely appealed the trial court's ruling compelling him to individually arbitrate. The California Court of Appeal treated the appeal as a writ petition, and ruled in a published opinion on April 22, 2002, that, under the specific facts and circumstances of this case, the "no class action" clause in Discover's arbitration agreement is unenforceable under the state law contract defense of unconscionability. The California Court of Appeal therefore struck the "no class action" clause in Discover's arbitration agreement.

The court did not strike the arbitration agreement in its entirety. However, because the real purpose of Discover's arbitration agreement is to preclude class actions, and not really to require arbitration of disputes, Discover chose not to arbitrate on a classwide basis.

6. In the Szetela decision, the California Court of Appeal analyzed all of the facts relevant to the unconscionability analysis and made numerous findings, including the following:

i. The weaker party (Mr. Szetela) was presented the "no class action" clause and told to "take it or leave it" without the opportunity for meaningful negotiation. Pet. App. 7a.

ii. The "no class action" clause was imposed in an oppressive manner. Pet. App. 7a.

iii. The "no class action" clause is unfair. Pet. App. 7a-8a.

iv. The "no class action" provision is "'so one-sided as to 'shock the conscience.'" Pet. App. 7a.

v. The issue of whether Discover's "no class action" provision is unconscionable is not even a close call. Rather, "[t]he manifest one-sidedness of the no class action provision . . . is blindingly obvious." Pet. App. 7a.

vi. Discover's "no class action" clause "is clearly meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the $29 sought by Szetela." (emphasis added). Pet. App. 7a-8a.

vii. Discover is "[f]ully aware that few customers will go to the time and trouble of suing in small claims court, [so] has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." Pet. App. 8a.

viii. Discover's "no class action" provision is "harsh and unfair to Discover customers who might be owed a relatively small sum of money." Pet. App. 8a.

ix. Discover's "no class action" provision "serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place." Pet. App. 8a.

x. "By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect." Pet. App. 8a.

xi. Discover's "no class action" provision creates "[t]he potential for millions of customers to be overcharged small amounts without an effective method of redress." Pet. App. 8a.

xii. Discover's "no class action" clause "violates fundamental notions of fairness." Pet. App. 8a.

7. Discover filed a petition for rehearing of the Szetela decision in the California Court of Appeal. The California Court of Appeal denied Discover's petition for rehearing on May 16, 2002.

8. Discover filed a petition for review in the California Supreme Court. The California Supreme Court denied Discover's petition for review on July 31, 2002.

REASONS FOR DENYING THIS PETITION

I. The Szetela Opinion Does Not Raise Any Federal Questions, Let Alone Compelling Federal Questions, Justifying Review on Certiorari

Because the Szetela opinion does not raise any federal questions, let alone compelling federal questions, this Court should not grant review on certiorari. Rule 10 of the Rules of the United States Supreme Court provides in part as follows:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . .
>
> > (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> >
> > (c) a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law."

(emphasis added)

The California Court of Appeal in the Szetela case simply did not decide a federal question, let alone an "important" federal question, justifying review on certiorari. The Szetela decision does not apply, and does not even purport to apply, federal law (other than citing to this Court's decision in Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996), which holds that state contract defenses apply to arbitration agreements governed by the FAA). Federal law is simply irrelevant to the Szetela Court's analysis under state unconscionability law. Therefore, there is no federal question implicated by the Szetela decision, and this Court should not review a state court opinion which does nothing more than apply state law.

II. The Szetela Opinion Does Not "Conflict" With The Opinions Of This Court (Or Any Other Federal Law)

Even if the Szetela Court had decided an important issue of federal law (which it did not), this Court should not grant review on certiorari because the Szetela decision does not "conflict" with any decisions of this Court. See Rule 10(c) of the Rules of the United States Supreme Court. [2]

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[2] In its Petition for a Writ of Certiorari, Discover cites to both Rules 10(b) (relating to conflicts with federal courts of appeals) and 10(c) (relating to conflicts with decisions of this Court) of the Rules of the United States Supreme Court. See Petition, page 3. However, Rule 10(b) does not even potentially apply. Rule 10(b) applies only when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." (emphasis added). The California Supreme Court denied review of the Szetela decision, and there has therefore been no decision by "a state court of last resort." Therefore,

The key factor is that the California Court of Appeal has not compelled classwide arbitration in this case, as repeatedly suggested by Discover throughout its brief. Nor has the California Court of Appeal certified classwide arbitration in this matter.

Discover attempts to label and characterize California as representing a minority view which provides for the imposition of class action procedures on arbitration agreements that are either silent as to such procedures or that expressly preclude them. Nowhere is such a view expressed.[3] Indeed, California follows the universally accepted view, expressed by this Court, that an arbitration agreement is subject to state law defenses, including unconscionability.[4] Federal law, as set forth in the decisions of this Court and elsewhere, simply does not require that unconscionable arbitration agreements, or unconscionable portions thereof, be enforced. On the contrary, federal law specifically provides that arbitration agreements are subject to ordinary state law contract defenses, including unconscionability. Therefore,

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there is no basis for review under the standards set forth in Rule 10 of the Rules of this Court absent a conflict with a decision of this Court. Moreover, as set forth below, there is no conflict with any decisions of any federal courts of appeals in any event.

[3] Discover refers to the California rule -- that classwide arbitration may be imposed when the parties agree to arbitrate, even if the parties expressly preclude classwide arbitration in their contract. This is simply not the holding of the Szetela Court.

[4] Discover suggests that parties to standard contracts containing standard arbitration provisions face the prospect of starkly different proceedings arising from those contracts -- all depending on whether they sue or are sued in California or somewhere else. The truth, however, is that no state will enforce a contract provision that is unconscionable. Thus, Petitioner's real argument lies in its assertion that another state's courts might not reach the same conclusion as the California court regarding the unconscionability and one-sidedness of the provision in question under the facts and circumstances of this case. This argument is not only without merit, but it is simply not a federal question at all.

the California Court of Appeal's application of state unconscionability law in the Szetela decision is in no way inconsistent with (and, in fact, is specifically authorized by) the FAA and other federal law, including decisions of this Court.

The central purpose of the FAA is not "enforcing arbitration agreements according to their terms" when the terms are unconscionable. Rather, the FAA provides that an arbitration agreement subject to the Act is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Therefore, an arbitration agreement is invalid if there is a contract defense, such as unconscionability. As this Court made clear in Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996), "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." (emphasis added). In fact, the California Court of Appeal in Szetela properly cited to this Court's opinion in Doctor's Associates for the proposition that "[a]n agreement to arbitrate is enforceable unless a recognized contract defense, such as unconscionability, exists." See Pet. App. 5a. Other California case law is also clear that state law is not preempted by the FAA on matters not specifically covered in the FAA itself (including specifically the issue of classwide arbitration). See, e.g., Blue Cross of California v. Superior Court, 67 Cal. App. 4th 42, 47 (1998) (the court agreed with plaintiffs' argument "that California's procedural law concerning the conduct of arbitration was not preempted by the [Federal Arbitration A]ct.").

Some recent federal district court decisions with similar holdings to the Szetela decision also make clear that state contract defenses, including unconscionability, apply to arbitration agreements, just as they apply to all other

contracts. For example, the recent decision in ACORN v. Household International, Inc., 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (which ruled that an arbitration agreement was unconscionable, based in part on a "no class action" clause similar to the clause at issue in this case) is instructive. In that case, the court stated:

> "In determining whether an agreement to arbitrate is valid, federal courts must 'apply ordinary state-law principles that govern the formation of contracts.' . . . 'General contract defenses such as fraud, duress or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements . . .'"

Id. at 1167. The court in ACORN further rejected an argument very similar to Discover's argument here:

> ". . . Defendants argue that because classwide arbitration is disfavored in federal court, it could not be unconscionable to prohibit class-wide arbitration in an arbitration agreement whose substantive terms are governed by the FAA.
>
> This subtle argument is ultimately unpersuasive. Defendants have merged the substantive unconscionability analysis with the analysis of the appropriate remedy upon a finding of unconscionability. These questions, however, are analytically distinct. The first question is whether the contract at issue is unconscionable. This is a question of State law. . . . Upon concluding that a contract is unenforceable under State law, the court must

> then turn to potential remedies. Because California courts may order class-wide arbitration, the appropriate remedy in State court may be to strike the unconscionable provision and enforce the remainder of the agreement. In doing so, a State court is able to enforce the agreement of the parties to the extent that agreement is not unconscionable."

Id. at 1171. Here, the question addressed by the Szetela Court was whether the "no class action" provision was unconscionable under state law. Upon concluding that the "no class action" provision was unconscionable, the Szetela Court then turned to the potential remedies, and struck the "no class action" provision from the arbitration agreement. In doing so, the California Court of Appeal was able to enforce the arbitration agreement, governed by the FAA, to the extent that it is not unconscionable under state law, which is no less than federal law requires. This was perfectly appropriate under applicable California law and entirely consistent with federal law.

The recent federal district court decision in Comb v. Paypal, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002) is also instructive. In that case, the court relied on state law to invalidate an arbitration agreement governed by the FAA on the ground that it was unconscionable. One of the factors the court considered was the prohibition on consolidation of claims. The court stated:

> "'The FAA creates a body of federal substantive law of arbitrability, enforceable in both state and federal courts and pre-empting any state laws or policies to the contrary.' . . . As a result, state laws hostile to arbitration agreements have been held invalid on the

> ground that such laws frustrate congressional intent to place arbitration agreements on the same footing as other contracts. . . .
>
> State law is not entirely displaced from FAA analysis, however. It is undisputed that 'generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.'"

Id. at 1170. The Court in Comb went on to cite to the Szetela decision and discuss (and reject) one of the arguments Discover makes in this Petition for a Writ of Certiorari:

> "PayPal argues that because federal cases applying the FAA have enforced arbitration clauses containing such prohibitions on collective actions, Szetela is irrelevant to the present proceedings. In the Ninth Circuit, however, while the FAA preempts any legislation 'specifically aimed at arbitration agreements,' '[i]n all situations where arbitration provisions are placed on the same footing as other contracts, state law applies.' Ticknor, 265 F.3d at 941 (citation and internal quotation omitted). Thus, while California's consumer protection statutes cannot prevent enforcement under the FAA of a prohibition on collective actions as such, a federal court properly may consider whether such a prohibition in combination with other provisions and circumstances renders an agreement substantively unconscionable as a matter of state law."

Id. at 1175-76 (footnote omitted). Similarly here, state contract defenses, including unconscionability, apply and are not preempted by the FAA or other federal law.

It is also significant that, far from being in "conflict" with federal law, the Szetela decision has actually been cited with approval by several federal courts, including the courts in both ACORN and Comb. See ACORN, supra, 211 F. Supp. 2d 1160 (citing to Szetela, the court denied a motion to compel arbitration, holding, among other things, that "the prohibition on class actions, although facially neutral, in reality benefits Defendants and restricts Plaintiffs' ability to secure any remedy at all."); and Comb, supra, 218 F. Supp. 2d 1165 (citing Szetela and holding that an arbitration agreement, which, among other things, prevented consolidation of claims, was unconscionable and unenforceable). In addition to these Northern District of California cases, the Szetela opinion has been cited with approval by two other federal courts, including once by the United States District Court for the Western District of Washington and once by the Ninth Circuit Court of Appeals.[5] See Luna v. Household Finance Corporation, --- F. Supp. 2d ---, 2002 WL 31487425 (W.D. Wash. 2002) (citing to Szetela, ACORN, supra, 211 F. Supp. 2d 1160, and Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002), among other cases, the court stated that the unfairness of the "no class action" provision "weighs heavily in favor of a finding of substantive unconscionability."); and Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778 (9th Cir. 2002) (The court cited to Szetela, and upheld the denial of a petition to compel arbitration on the grounds that the arbitration clause was both procedurally and substantively unconscionable."). Therefore, the Szetela case is not "inconsistent" with federal law, and

---

[5] Notably, in its Petition for a Writ of Certiorari, Discover does not even mention the Ninth Circuit opinion citing the Szetela case.

has even been cited with approval by the Ninth Circuit Court of Appeals.

In addition to the cases citing it, the Szetela case is also consistent with other recent decisions, including other federal court decisions which come to similar holdings. See, e.g., Ting, supra, 182 F. Supp. 2d 902 (The court held, among other things, that a provision in an arbitration clause purporting to preclude classwide relief was procedurally and substantively unconscionable and unenforceable under state law.)[6]

---

[6] As set forth above, Rule 10(b) of the Rules of the United States Supreme Court, which refers to "conflicts" with the decisions of the United States Courts of Appeals, does not apply here. Nevertheless, it does bear brief mention that there is no "conflict" with any United States Courts of Appeals' decisions. The Seventh Circuit has held that courts are without authority to order class-wide arbitration unless the parties have expressly agreed to that procedure. This does not conflict with the Szetela decision since the Szetela Court did not order class-wide arbitration. It simply held the ban on classwide relief unconscionable under the facts and circumstances of this action. The Third, Fourth, Eighth, and Eleventh Circuits have enforced arbitration agreements despite the unavailability of class action procedures under those agreements. However, in none of those cases was there a finding of unconscionability in the arbitration agreement itself. There is no conflict between the decisions of these cases and the decision of the Szetela Court. The fact is that some arbitration agreements may be enforceable while others may not be. It depends on the facts and circumstances of the case and the agreement in question. Whether a specific agreement is unconscionable under the facts and circumstances of the case is a question of state law. There is no federal law which requires that all arbitration agreements be enforced according to their terms, regardless of the nature and wording of the arbitration agreement or the facts and circumstances under which it is invoked. The Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit decisions which preclude courts from requiring consolidation of arbitration proceedings unless the parties expressly provide for such procedures in their arbitration agreements do not conflict with the Szetela decision for two reasons. First, there was no finding of unconscionability in any of the cases cited by petitioner. Second, the Szetela Court did not order consolidation of arbitration proceedings.

Therefore, while respondent does not dispute that the FAA governs the arbitration clause in this case, the FAA and cases falling thereunder do not require that an unconscionable arbitration provision, including an unconscionable "no class action" clause, be given effect. The Szetela decision presents no "conflict" with federal law, and this Court should not grant review on certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny Discover's Petition for a Writ of Certiorari.

Respectfully submitted,

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(3)

No. 02-829

IN THE

Supreme Court of the United States

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Fourth Appellate District

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the American Bankers Association ("ABA"), the American Financial Services Association ("AFSA"), the Consumer Bankers Association ("CBA") and the Chamber of Commerce of the United States (the "Chamber") respectfully move this Court for leave to file the accompanying Brief as *amici curiae* in support of the position of Petitioner Discover Bank ("Discover") in this case. The written consent of Discover has been filed with the Clerk of Court. Counsel for Respondent John Szetela has not consented.

The proposed *amici* have a substantial interest in the outcome of this case.

The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

The AFSA was organized in 1916 and represents more than 300 companies operating more than 10,000 offices engaged in the extension of consumer credit throughout the United States. These companies range from independently

owned consumer finance offices to the nation's largest financial services, retail and automobile companies. The AFSA's membership includes national and state banks that operate multi-state consumer credit programs.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. CBA members hold more than 900 bank and thrift charters with total assets of more than $2.9 trillion.

The Chamber is the world's largest business federation representing an underlying membership of more that 3,000,000 businesses of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch.

The ABA, the AFSA, the CBA and the Chamber frequently appear in litigation as *amicus curiae* where the issues raised are of widespread importance and concern to banks, consumers of banking services or the nation's business community. *See, e.g.*, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) (the ABA and the CBA as *amici*); *Textron Funding Corp. v. Bessette*, 532 U.S. 1048 (2001) (the AFSA as *amicus*); *Vermont Agency of Natural Resources v. United States*, 528 U.S. 1044 (1999) (the Chamber as *amicus*). Many ABA, AFSA, CBA and Chamber members regularly include arbitration agreements in their consumer loan documents and deposit and business contracts.

Many of those agreements expressly state that class-wide arbitration is not permitted.

The *Szetela* opinion raises issues of exceptional importance to banks, consumer financial services companies, credit card issuers and other businesses throughout the nation which have entered or are planning to enter into arbitration agreements governed by the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* ("FAA"). Many of the arbitration agreements used by *amici* include express "no-class action" provisions—similar to Discover's—because arbitration is designed to be simpler, faster and cheaper than court proceedings. Agreeing to waive complex litigation procedures, such as class actions, obviously effectuates these admirable goals of arbitration.

Amici have relied on the decisions of numerous federal courts of appeals, federal district courts and state supreme courts applying the FAA which have enforced no-class action provisions in arbitration agreements and found them to be not unconscionable. Discover's arbitration agreement is governed by the FAA. Nevertheless, the *Szetela* court ignored the FAA and struck the no-class action provision as unconscionable on the grounds that it discourages individuals with small claims from enforcing their rights and causes "litigants to contract away the court's ability to use a procedural mechanism [the class action] that benefits the court system as a whole." 118 Cal. Rptr. 2d at 868.

The *Szetela* court's reasoning cannot be reconciled with this Court's declarations that "the FAA is 'at bottom a policy *guaranteeing* the enforcement of private contractual arrangements'" and that "we look first to whether the parties *agreed* to arbitrate a dispute, *not to general policy goals*, to determine the scope of the agreement . . . ." *EEOC v. Waffle House, Inc.* 122 S. Ct. 754, 764 (2002) (emphasis added). In particular, the *Szetela* opinion impermissibly forces companies to choose between forced class arbitration or no

arbitration at all and improperly relegates individual arbitration to second-class status.

By flouting the FAA's "guarantee," the *Szetela* opinion generates substantial confusion and disrupts the settled expectations of *amici* that arbitration agreements will be enforced strictly in accordance with their terms. The opinion will both discourage companies from arbitrating, while encouraging hostility to arbitration of the type that the FAA was enacted to overcome.

WHEREFORE, the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association and the Chamber of Commerce of the United States respectfully request that the Court grant them leave to file the accompanying Brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the California Court of Appeal properly ruled—in conflict with the Federal Arbitration Act, this Court's precedents, and the decisions of all the federal courts of appeal to have addressed the issue—that parties to an arbitration agreement can be forced to arbitrate as a class or not at all, when their arbitration agreement expressly forecloses the use of class arbitration.

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IN THE

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v.

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Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Fourth Appellate District

BRIEF FOR AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This *amici curiae* brief[1] is submitted in support of the petitioner, Discover Bank ("Discover").

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members and their counsel. Petitioner Discover Bank is a member of the *amici curiae* directly or through its affiliates.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes—money center banks, regional banks and community banks. ABA members hold approximately 95 percent of the domestic assets of United States banks.

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SUMMARY OF ARGUMENT

The *Szetela* opinion raises issues of exceptional importance to banks, consumer financial services companies, credit card issuers and other businesses throughout the nation which have entered or are planning to enter into arbitration agreements governed by the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* ("FAA"). Many of the arbitration agreements used by *amici* include express "no-class action" provisions—similar to Discover's—because arbitration is designed to be simpler, faster and cheaper than court proceedings. Agreeing to waive complex litigation procedures, such as class actions, obviously effectuates these admirable goals of arbitration.

Amici have relied on the decisions of numerous federal courts of appeals, federal district courts and state supreme courts applying the FAA which have enforced no-class action provisions in arbitration agreements and found them to be not unconscionable. Discover's arbitration agreement is governed by the FAA. Nevertheless, the *Szetela* court ignored the FAA and struck the no-class action provision as unconscionable on the grounds that it discourages individuals with small claims from enforcing their rights and causes "litigants to contract away the court's ability to use a

procedural mechanism [the class action] that benefits the court system as a whole." 118 Cal. Rptr. 2d at 868.

The *Szetela* court's reasoning cannot be reconciled with this Court's declarations that "the FAA is 'at bottom a policy *guaranteeing* the enforcement of private contractual arrangements'" and that "we look first to whether the parties *agreed* to arbitrate a dispute, *not to general policy goals*, to determine the scope of the agreement . . . ." *EEOC v. Waffle House, Inc.* 122 S. Ct. 754, 764 (2002) (emphasis added). By flouting the FAA's "guarantee," the *Szetela* court's opinion generates substantial confusion and disrupts the settled expectations of *amici* that arbitration agreements will be enforced strictly in accordance with their terms. The opinion will both discourage companies from arbitrating, while encouraging hostility to arbitration of the type that the FAA was enacted to overcome.[2]

ARGUMENT

I. THE *SZETELA* OPINION UNDERMINES THE FAA'S GUARANTEE THAT ARBITRATION AGREEMENTS WILL BE ENFORCED STRICTLY IN ACCORDANCE WITH THEIR TERMS.

Arbitration under the FAA is a matter of consent, not coercion. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). The FAA's "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 478 (1989). *See also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("the preeminent concern of Congress

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[2] *See, e.g., Luna v. Household Fin. Corp.*, No. C02-1635L, 2002 U.S. Dist. LEXIS 21761 (W.D. Wash. Nov. 4, 2002); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2001); *ACORN v Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002) (all denying motions to compel arbitration and all citing *Szetela*).

in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate"). This Court further instructed in *Waffle House*:

> "[I]t is the language of the contract that defines the scope of disputes subject to arbitration . . . . *[N]othing in the statute [the FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.*" 122 S.Ct. at 762 (emphasis added).

A. Under the FAA, Arbitration Agreements that Contain No-Class Action Provisions Must Be Enforced as Written and Are Not Unconscionable.

A party considering arbitration is making a decision whether the benefits of arbitration outweigh its limitations. Arbitration is a "less expensive alternative to litigation," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995), in part because of its very informality. "[A]rbitration saves time, saves trouble, saves money." Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 7 (1924).[3] Converting an agreement to arbitrate individual disputes into a *class* arbitration, however, radically alters this calculus. For a court "to read such a term into the parties' agreement disrupt[s] the negotiated risk/benefit allocation and direct[s] the parties to proceed with a different sort of arbitration." *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotations and brackets omitted).

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[3] As Congress found in 1982, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep No. 97-542, at 3 (1982); *see also Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1307, 1313 (2001).

Accordingly, and consistent with the fundamental principle that nothing in the FAA "authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement," *Waffle House*, *supra*, the vast majority of federal and state courts that have considered the issue have held that under the FAA, an express agreement to not permit class-wide arbitration must be strictly enforced in accordance with its terms. Even if the clause is merely silent on the issue, class-wide arbitration cannot be ordered.[4]

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[4] *See, e.g.*, *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001) (where "the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals"); *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) ("it appears impossible [to pursue class arbitration] unless the arbitration agreement contemplates such a procedure"); *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 817-818 (11th Cir. 2001) (a "contractual provision to arbitrate TILA [Truth in Lending Act] claims is enforceable even if it precludes a plaintiff from utilizing class action procedures"); *Deiulemar Compagnia de Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999) (where the parties' agreement did not provide for class arbitration, "the FAA has already provided the type of procedure to be followed in this case, namely, nonclass arbitration"); *Champ v. Siegel Trading Co., Inc.*, *supra*, 55 F.3d at 271 ("absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration"); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 509 (7th Cir. 1999) ("[b]ecause arbitration is based fundamentally on an agreement between the parties, [a Rule 23 class action] is normally unavailable in arbitration"); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001) (compelling arbitration of plaintiff's TILA claims even though she was precluded from representing a class); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002) (court cannot order arbitration to proceed on class-wide basis unless arbitration agreement expressly authorizes it); *Gray v. Conseco, Inc.*, 2001 U.S. Dist. LEXIS 21696 (C.D. Cal. Sept. 6, 2001) (even where arbitration clause is merely silent on the issue, court cannot order class-wide arbitration); *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994), *appeal*

Moreover, recognizing that a class action is a mere procedure that can be waived, the federal and state courts overwhelmingly hold that a no-class action provision in an arbitration agreement is not unconscionable under the FAA.[5]

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dismissed, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998) (same); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994) (same); *Gras v. Associates First Cap. Corp.*, 2001 WL 1632292 (N.J. Super. Ct. App. Div. Dec. 20, 2001) (enforcing "no class action" provision in arbitration agreement); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001) (FAA preempts state law favoring class); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1270 (Wash. Ct. App. 2001) (refusing to compel class arbitration where parties' agreement was silent); *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998) ("to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration").

[5] *See, e.g.*, *Lloyd v. MBNA America Bank, N.A.*, No. 01-1752, slip op. at 3 (3d Cir. Jan. 7, 2002) (because right to a class action is "merely procedural" and may be waived, "an arbitration clause barring classwide relief for claims brought under the TILA is not unconscionable"); *Snowden* v. *Checkpoint Check Cashing, Inc.*, 290 F.3d 631, 638-639 (4th Cir. 2002) (finding no-class action provision to be not unconscionable), *cert. denied*, 2002 U.S. LEXIS 9264 (Dec. 16, 2002); *Pick v. Discover Fin. Servs., Inc.*, No. 00-935-SLR, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) ("it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions"); *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001) (no-class action provision is not unconscionable and must be enforced); *Thompson v. Illinois Title Loans, Inc.*, No. 99 C 3952, 2000 WL 45493, at *4 (N.D. Ill. Jan. 11, 2000) ("[t]he class action is a procedural device that ... claimants may waive by agreeing to arbitrate their claims"); *Zawikowski v. Beneficial Nat'l Bank*, No. 98 C 2178, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999) (court rejected argument that inclusion in a consumer loan agreement of a clause prohibiting class actions was void as a matter of public policy, holding that "[n]othing prevents the Plaintiffs from contracting away their right to a class action"); *Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F. Supp. 1048, 1065 (N.D. Ga. 1986), *aff'd in part and rev'd in part on different grounds*, 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (class action rule is a mere "procedural device" that is subject to preemption by the FAA);

Amici have relied on this legion of well-reasoned authorities in deciding to utilize consumer arbitration agreements which call for individual, rather than class, resolution of disputes. Until *Szetela*, they have been confident that such agreements would be enforced according to their terms, ensuring that the attributes of arbitration—speed, efficiency and economy—would be realized.

Caudle v. American Arbitration Ass'n, 230 F.3d 920 (7th Cir. 2000) ("[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants"); *Lomax v. Woodmen of the World Life Ins. Soc.*, No. CIV.A.1:01-CV-2134WBH, 2002 WL 31455600, *3 (N.D. Ga. July 16, 2002) ("[g]enerally, prohibiting class-wide arbitration does not render an otherwise valid arbitration clause unconscionable"); *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002) (FAA forbids federal court from ordering class arbitration where parties' arbitration agreement is silent on matter); *Vigil v. Sears Nat. Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002) (rejecting argument that arbitration clause was unconscionable because it prohibited class actions); *Lewis Tree Service, Inc. v. Lucent Technologies, Inc.*, No. 99 Civ. 8556, 2002 WL 31619029 (S.D.N.Y. Nov. 20, 2002) ("[f]ederal courts have ... consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue"); *Mattox v. Decision One Mortgage Co.*, No. Civ. A. 0-10657, 2002 WL 31121087 (D. Mass. Sept. 26, 2002) (arbitration clause enforceable even in absence of class action); *McIntyre v. Household Bank*, 216 F. Supp. 2d 719, 724 (N.D. Ill. Aug. 19, 2002) (right to class action may be "waived in order to enforce arbitration"); *Shales v. Discover Card Services, Inc.*, No. 02-0080, 2002 WL 2022590, at *2 (E.D. La. Aug. 30, 2002) ("Shales raised the issue of the validity of the class action restriction contained in the agreement. Although he cites to a California state court decision that struck such a restriction under California law [*Szetela*], the court notes that such restrictions are routinely enforced in this jurisdiction.").

B. The Principle that No-Class Action Provisions Are Enforceable in Accordance with Their Terms Is Substantive Federal Arbitration Law that Preempts Inconsistent State Procedures.

Although class actions are procedural in nature,[6] the principle that no-class action clauses are enforceable in accordance with their terms is substantive federal arbitration law that preempts inconsistent state procedures. In *Champ v. Siegel Trading Co., supra*, the Seventh Circuit held that where the parties' arbitration clause does not expressly authorize class actions in arbitration, the "*FAA [itself]* has already provided the type of procedure to be followed . . ., namely, non-class-action arbitration." 55 F.3d at 276 (emphasis added). *See also Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858, 860 (4th Cir. 2000) ("Federal law governs the construction of contract language concerning arbitrability . . . . 'Once a dispute is covered by the [FAA], federal law applies to all questions of interpretation [and] construction . . .'") (citations omitted). The FAA creates "federal substantive law" that is "applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). Therefore, the *Szetela* court lacked authority to strike the no-class action provision from the arbitration agreement simply because it preferred the class action procedure over individual arbitration.

C. The Szetela Opinion Impermissibly Forces Companies to Choose between Class Arbitration or No Arbitration at All.

By striking the no-class action provision, the *Szetela* court jettisoned the risk/benefit analysis that the parties engaged in prior to agreeing to arbitrate in the first instance. This

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[6] *See, e.g.*, Fed. R. Civ. P. 23.

intrusion into the private contracting process is of great concern to *amici*, many of whose members have implemented or are planning to implement arbitration programs in reliance upon the heretofore settled premise that arbitration agreements governed by the FAA will be enforced as written. If courts are permitted to materially alter private arbitration agreements governed by the FAA in order to effectuate state procedures, parties will be greatly discouraged from arbitrating their disputes, since there will be no predictability or assurance that the parties' contractual terms will be respected, notwithstanding the FAA's "guarantee" that such terms must be enforced as written.

Indeed, striking a no-class action provision imposes a Hobson's Choice—face the prospect of class-wide arbitration[7] or abandon arbitration altogether. The effect of refusing to enforce a no-class action provision is to sweep complex extra-contractual issues (class action criteria), strangers to the contract (hundreds, thousands or even millions of absent putative class members) and constitutional considerations (due process protections) into what was supposed to be a fast and economical individual arbitration.

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[7] In some states, such as California and South Carolina, a clause that is silent on the issue of class-wide arbitration is susceptible to an argument that class-wide arbitration should be permitted. *See, e.g., Keating v. Superior Court*, 31 Cal. 3d 584 (1982), *rev'd in part on other grounds*, 465 U.S. 1 (1984); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Bazzle, et al. v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002), *pet. for cert. filed* (Oct. 23, 2002). *Amici* strongly endorse Petitioner's argument that review should be granted to resolve the growing conflict between these and certain other state court decisions which impose class action procedures on arbitration agreements that are either silent as to such procedures or that expressly preclude them, and federal court decisions which uniformly hold that courts may not impose class arbitration unless the parties' arbitration agreement expressly provides for that procedure and that arbitration agreements containing express no-class action provisions are enforceable. *See* Pet. for Cert. at 13-20.

This is the exact *opposite* of the fundamental principle that "nothing in the statute [the FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *Waffle House, supra.*

Even the few courts that compel forced class arbitration concede that "[w]ithout doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Keating v. Superior Court, supra*, 31 Cal. 3d at 613; *see also Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) ("[c]lass-wide arbitration is a different animal than individual arbitration"). In particular, class-wide arbitration has to draw upon the array of procedural mechanisms and inquiries that Fed. R. Civ. P. 23 (or its state law equivalent) specifies in order to satisfy constitutional due process standards. The management of large class actions is a time-consuming, costly and complex process, even when managed by experienced trial judges, much less by arbitrators who typically lack the case-management skills and experience that trial judges develop from handling class actions. In sharp contrast, arbitration under the FAA is a procedure that is supposed to avoid the delay, cost and complexity of even single-party litigation in the federal or state courts.

Faced with the prospect of participating in a class-wide arbitration that is radically different from the procedure agreed to, and is not really arbitration at all, most companies would almost surely decide to abandon arbitration altogether (which is what Discover did in this case). *See Champ v. Siegel Trading Co., Inc., supra*, 55 F.3d at 275 ("'to substitute our own notion of fairness in place of the explicit terms of [the parties' arbitration] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate'") (citations omitted). Thus, refusing to enforce a no-class action provision agreed

to by the—parties is tantamount to a refusal to compel arbitration altogether—a result that nullifies the federal policies embodied in the FAA and turns the statute on its head.

II. THE *SZETELA* OPINION IMPROPERLY RELEGATES INDIVIDUAL ARBITRATION TO SECOND-CLASS STATUS

Amici are also deeply troubled by the *Szetela* court's bias *against* arbitration as a method of dispute resolution. The court characterized the no-class action provision as a "get out of jail free" card for Discover that created "virtual immunity" for the company. 118 Cal. Rptr. 2d at 867. It also concluded that individual arbitration is of "no benefit whatsoever" to consumers with small claims. *Id.* at 868. Arbitration was also denied because the *Szetela* court perceived it to be less "efficient" than class actions brought in court. *Id.* Such anti-arbitration animus, in this day and age, is as shocking as it is legally incorrect. Review is necessary to restore the confidence of the business community in arbitration as an *equal*—not less favored—means of dispute resolution.

"[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix*, 513 U.S. at 270. In passing the FAA, Congress sought to place "arbitration agreements upon the same footing as other contracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987). This Court has also made it clear that by agreeing to arbitrate, "a party does not forgo . . . substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *accord*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action

in the arbitral forum,' the statute serves its functions"). Although these principles were fully applicable in the present case,[8] they were completely ignored by the *Szetela* court.

The *Szetela* court also refused to enforce the parties' arbitration agreement, as written, because it concluded that individual arbitration is a less "efficient" method of resolving disputes than class actions in court. The court stated:

> "[T]he clause violates public policy . . . . One of the policy reasons for class actions is to promote judicial economy and streamline the litigation process in appropriate cases. To allow litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole is no more appropriate than contracting away the right to bring motions in limine, seek directed verdicts, or use other

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[8] In the present case, it was undisputed that all of Szetela's *substantive* claims against Discover would be preserved in arbitration. Discover's arbitration agreement expressly provides that the arbitrator "shall follow applicable substantive law . . . ." Moreover, class actions are hardly the only mechanism for enforcing Szetela's rights. For example: (a) under the Discover arbitration agreement, individuals with small claims can arbitrate or they can pursue their claims in small claims court; (b) the Delaware Consumer Fraud Act, under which Szetela asserted claims against Discover, establishes a comprehensive scheme of enforcement by the Delaware Attorney General. *See* 5 Del. Code §§2514 *et seq.*; (c) pursuant to 5 Del. Code §143, the Delaware State Bank Commissioner is empowered to require Delaware banks to take affirmative action to correct violations of Delaware banking statutes and regulations and to impose civil penalties if the violations are not corrected; and (d) the FDIC is authorized to seek remedies (including cease and desist orders, restitution, suspension or removal of affiliated parties from office and civil monetary penalties) for any violations of state or federal law by state banks such as Discover. 12 U.S.C. §1818 (b)-(i). *See Johnson v. West Suburban Bank, supra* (the availability of administrative enforcement of TILA by the FDIC and other agencies supported enforcement of the bank's arbitration clause, even though class actions were not available in arbitration).

> procedural devices that allow the courts to operate in an efficient manner." 118 Cal. Rptr. 2d at 868.

This is a stinging indictment of arbitration and an encomium on the benefits of court litigation. But it is 77 years too late. Following the passage of the FAA in 1925, the *only* public policy that is relevant once parties have entered into an arbitration agreement governed by the FAA is the *federal* public policy making the arbitration agreement enforceable in accordance with its terms. The *Szetela* opinion is a throwback to the days when arbitration agreements were not enforced for the very reason that they were "arbitration agreements" which removed the parties from the judicial system. But the days when it was permissible to discriminate against arbitration in favor of court litigation are long over, as this Court recounted in *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*:

> "Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration . . . . Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" 500 U.S. at 30 (citation omitted).

Accord, *Green Tree Fin. Corp.-Ala. v. Randolph*, *supra*, 531 U.S. at 89-90. Significantly, in *Gilmer*, one of plaintiff's objections to arbitration was that class actions were not available. This Court dismissed that objection, holding that "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator . . . that . . . does not mean that individual attempts at conciliation were intended to be barred.'" 500 U.S. at 32 (citation omitted).

Moreover, the *Szetela* court had it backwards. While the *Szetela* court concluded that arbitration must yield to court procedures that promote efficiency, this Court has made it abundantly clear that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original). *Accord*, *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 (1985) (courts are required to enforce the bargain of the parties to arbitrate even where the result would be the possibly inefficient maintenance of separate proceedings in different forums).

Amici firmly believe, and this Court has often observed, that arbitration is a process that benefits individuals.[9] As indicated in *Gilmer*, this is so even if the arbitration proceeds on an individual, rather than a class action, basis. Review is warranted so that arbitration regains its rightful place—not below litigation, but on the "same footing." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

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[9] *Circuit City Stores, Inc. v. Adams*, *supra* (compelling arbitration in dispute between employee and employer); *Green Tree Financial Corp.-Ala. v. Randolph*, *supra* (compelling arbitration of named plaintiff's claims in dispute between lender and borrower who had brought putative class action); *Allied-Bruce Terminix*, *supra* (compelling arbitration in dispute between homeowner and service company and observing that arbitration is "helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation"). Indeed, "Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix*, 513 U.S. at 280 (citation omitted).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the Petition for Certiorari.

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IN THE

Supreme Court of the United States

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. On January 10, 2003, this Court granted the petition for certiorari in *Green Tree Financial Corp.* v. *Bazzle*, No. 02-634, which asks "[w]hether the Federal Arbitration Act prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration." 71 U.S.L.W. 3320. This petition asks the related question whether the Federal Arbitration Act prohibits a court from striking a clause in an arbitration agreement that *expressly* barred class-action arbitration—thus forcing the parties to choose between arbitrating as a class or not arbitrating at all. This petition should likewise be granted, or at the least held pending resolution of *Green Tree*.

The Supreme Court of South Carolina in *Green Tree* purported to apply the "California approach" to the question

whether courts could impose class procedures on arbitration agreements that did not speak to the issue. *Bazzle* v. *Green Tree Financial Corp.*, 569 S.E.2d 349, 356 (S.C. 2002) (citing *Keating* v. *Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd in part and dismissed in part*, 465 U.S. 1 (1984)), *cert. granted*, ___ S. Ct. ___, 71 U.S.L.W. 3320 (Jan. 10, 2003); *id.* at 357-358 (citing *Blue Cross of Cal.* v. *Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. App. 1998), *cert. denied*, 527 U.S. 1003 (1999)). The California Court of Appeal decision giving rise to this petition took the "California approach" to the next level. The Court of Appeal found that a clause in an arbitration agreement prohibiting class procedures in arbitration was "unconscionable" because it contravened state policy in favor of class dispute resolution. *See* Pet. App. 8a-9a. In striking that procedural limitation on the parties' agreement to arbitrate, the court improperly modified the agreement, contravening the Arbitration Act's firm admonition that such agreements be enforced according to their terms. Where in *Green Tree* the court added terms to the parties' agreement by imposing class procedures on the arbitral proceeding, here the Court of Appeal subtracted terms from the parties' arbitral contract, leaving them with a choice—arbitrate class-wide or litigate class-wide—for which the parties had not bargained. This Court should grant certiorari in this case as well, to address and resolve this equally unlawful expansion of the "California approach."

2. Respondent "does not dispute" that the Federal Arbitration Act "governs the arbitration clause in this case." Opp. 16. Yet his principal refrain in opposition is that Discover's petition raises only a question of state law. *See id.* at 8, 9, 10, 12, 14.[1] That is demonstrably wrong.

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[1] The respondent in *Green Tree* offered the same argument in opposition to the petition for certiorari. *See Green Tree* Opp. 13 (arguing in heading I that "the state supreme court applied state law as permitted under the FAA and this Court's decisions"); *id.* at 13-18.

The Arbitration Act requires courts to enforce agreements to arbitrate according to their terms. That is its "central purpose." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53 (1995). The California Court of Appeal invoked "unconscionability" grounds to strike the no-class-action provision in the parties' arbitration agreement. *See* Pet. 7-8, 12-13; Pet. App. 8a-9a. Its decision therefore implicates Section 2 of the Arbitration Act, requiring courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see* Opp. 10 (quoting Section 2).

Section 2 carves out a narrow exception to the Act's command, permitting parties to resist enforcement of arbitration agreements based on generally-applicable state-law contract defenses, including unconscionability. *See Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996). But a court may not invoke Section 2 to deem "unconscionable" procedural waivers specific to arbitration agreements, as the California Court of Appeal did here; the Act does not permit such glib evasions of its charge. *See Perry* v. *Thomas*, 482 U.S. 483, 493 n.9 (1987) (court "may not * * * in assessing the rights of litigants to enforce an arbitration agreement, * * * rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable"). Parties who agree to arbitrate typically give up rights associated with judicial proceedings. For example, such parties waive their constitutional right to a jury trial, among other things. *See Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting) ("arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment"); *American Heritage Life Ins. Co.* v. *Orr*, 294 F.3d 702, 711 (5th Cir. 2002). Since such relinquishment is the essence of arbitration, a court may not deem it unconscionable without running afoul of Section 2 of the Act.

Respondent also claims that "[f]ederal law is simply irrelevant to the *Szetela* court's analysis under state unconscion-

ability law." Opp. 8. That is exactly what is wrong with the California Court of Appeal's decision. The federal question whether the Arbitration Act preempts state law or policy favoring class dispute-resolution procedures was directly relevant to the lower courts' inquiry, as Discover explained at every step of the proceedings below. *See* Pet. 7-9. That the Court of Appeal studiously ignored federal law in its opinion does not insulate its decision from review.[2]

In addition, appellees in *Southland Corp.* v. *Keating*, 465 U.S. 1—in which the same question presented by this petition was raised on review—offered the same "state-law" protestations respondent offers here, to no effect. When the *Southland* appellants filed their jurisdictional statement in this Court, the appellees moved to dismiss, arguing, among other things, that the case presented "no substantial federal question" because "[t]he issue as to whether the arbitration can be handled on a class action basis is purely a question of state law." Mot. To Dismiss (No. 82-500) at 9. This Court nonetheless took up the issue, dismissing it only when it became apparent at the merits stage that the federal question presented had not adequately been raised below.[3] This Court should be similarly unswayed by respondent's arguments that the California Court of Appeal's decision implicates only state, and not federal, law.

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[2] On January 7, 2003, the Court of Appeal expressly considered and rejected the argument that the Federal Arbitration Act preempted state policies favoring class proceedings. *Mandel* v. *Household Bank (Nevada)*, 2003 WL 57282 (Cal. App. 4th Dist. Jan. 7, 2003). Relying on and reaffirming its decision in this case, the court in *Mandel* severed from an arbitration agreement a provision prohibiting class arbitration without the consent of both parties. *Id.*

[3] As Discover explained in its petition (at 12), that jurisdictional bar is not present in this case, and respondent does not and cannot argue otherwise.

3. Beyond asserting incorrectly that the California Court of Appeal's decision presents a purely state-law issue, respondent has little to say. He argues that there is no "conflict" between the California Court of Appeal's decision and this Court's Arbitration Act precedents. Opp. 8. For support he relies on a handful of *district court* cases following the California minority rule. *See id.* at 10-15.[4]

Respondent does not, however, come to grips with *this* Court's decisions, nor does he even cite them. He thus never explains how the Court of Appeal's decision to superimpose the "procedural mechanism" of class proceedings on the parties' arbitration agreement—while citing policies in favor of "streamlin[ing] the litigation process," "efficien[cy]," and "judicial economy,"[5] Pet. App. 9a—squares with this Court's repeated statements that the Arbitration Act "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in

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[4] Further, in quoting lengthy passages from the few district court cases to have followed the California rule, respondent neglects to address or explain the majority rule set forth in the host of district court decisions holding to the contrary. *See* Pet. 16 & n.6 (citing cases); *see also Primerica Fin. Servs., Inc.* v. *DiUrales*, 2002 WL 31844901 (E.D. La. Dec. 16, 2002) (compelling arbitration of individual claim where arbitration agreement did not provide for class proceedings); *Lewis Tree Serv., Inc.* v. *Lucent Techs. Inc.*, ___ F. Supp. 2d ___, 2002 WL 31619029, at *4 (S.D.N.Y. Nov. 20, 2002) (citing *Gilmer* and noting that "[f]ederal courts have * * * consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue"). Among those district court cases adverse to respondent, moreover, are several specifically rejecting the argument that a no-class-action provision renders an arbitration agreement "unconscionable." *See* Pet. 16 n.6.

[5] Since arbitration occurs outside the judicial context, of course, an arbitral proceeding could only *aid* "judicial efficiency."

original); *see Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 220-221 (1985) (admonishing courts not to allow considerations of "efficien[cy]" to "overshadow" the Arbitration Act's central purpose). Nor does respondent attempt to reconcile the Court of Appeal's holding with this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), which compelled arbitration of claims arising under the Age Discrimination in Employment Act despite the petitioner's insistence that arbitration would eliminate his "right" to a class action.

4. Only in a footnote at the end of his opposition does respondent answer the lead-off argument in Discover's petition: that the California rule conflicts with the approach of *all* the federal circuits to have addressed the issue.[6] *See* Pet. 13-15; Opp. 15 n.6. As Discover explained in its petition, every circuit to have considered the question has held that courts lack authority to order class-wide arbitration unless the parties expressly agreed to that procedure, *see Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 276-277 (7th Cir. 1995), and, relatedly, have enforced arbitration agreements where no class action procedures were available. *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638-639 (4th Cir.), *cert. denied*, 123 S. Ct. 695 (2002); *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720 (8th Cir. 2001); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 817-818 (11th Cir. 2001); *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).[7]

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[6] Respondent is wrong when he suggests that the Ninth Circuit has adopted the California approach. *See* Opp. 14. The panel in *Ferguson* v. *Countrywide Credit Indus., Inc.*, 298 F.3d 778, 784 (9th Cir. 2002), cited the California Court of Appeal's decision on an aspect of procedural unconscionability irrelevant to the federal inquiry here.

[7] *See also Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (plaintiff's "inability to bring a class action * * * cannot

The California decision is also in conflict with the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, all of which have concluded that the Arbitration Act precludes courts from consolidating arbitration proceedings unless the parties expressly provided for consolidation in their arbitration agreements. *See* Pet. 17 n.8.

Respondent's first answer to this sharp conflict is that the California Court of Appeal's decision does not warrant review because it is not from a state "court of last resort." Opp. 15 n.6; *see id.* at 8-9 n.2. That is just wrong. The California Supreme Court denied discretionary review of the Court of Appeal's decision, Pet. App. 11a, rendering the Court of Appeal's decision the final decision of the state courts. *See Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 678 n.1 (1968); Robert L. Stern *et al.*, *Supreme Court Practice* 167 (8th ed. 2002) (if highest state court declines to exercise discretionary review, "the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable").

Respondent next argues in his footnote that the conflict between the California approach to the Arbitration Act and that of the federal courts of appeal is actually "not a conflict," because the California Court of Appeal "did not order classwide arbitration" but instead struck the arbitration agreement's prohibition on classwide arbitration. Opp. 15 n.6. That is a totally meaningless distinction. The Court of Appeal forced the parties to choose between arbitrating as a class or not arbitrating at all. *See* Pet. i, 2, 4, 11, 13. That is not what they agreed to, and no more in keeping with *Champ*, *Randolph*, *Johnson*, *Snowden*, and *Dominium* than if the court had ordered arbitration to proceed classwide. And respondent's last assertion—that the Court of Appeal's ruling on "unconscionability" grounds eliminates the conflict

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by itself suffice to defeat the strong congressional preference for an arbitral forum").

between that court and the circuit courts, Opp. 15 n.6—is equally meritless, because it necessarily depends on the assumption that the Court of Appeal's decision was *right*. It was not. Federal law precluded the court from striking the parties' express agreement not to use class procedures in arbitration. That is the point of this petition.

5. With this Court's grant of certiorari in *Green Tree Financial Corp.* v. *Bazzle*, the national importance of the question presented in this petition is beyond serious dispute. *See also* Mot. for Leave to File Br. Amici Curiae and Br. for American Bankers Association, American Financial Services Association, Consumer Bankers Association, and Chamber of Commerce of the United States. This Court repeatedly has admonished that arbitration agreements must be enforced according to their terms. All of the federal circuit courts, the vast majority of the district courts, and a healthy number of state courts all have fallen in line with this statutorily-mandated principle, declining to impose class procedures on an arbitration in the absence of the parties' agreement. California, however, has not; and what is more, that court's fixed adherence to a pre-Arbitration Act-era suspicion of arbitral procedures has attracted a few recent followers. *See Bazzle*, 569 S.E.2d at 356-358 (analyzing and adopting "California approach" to whether trial courts may order class arbitration when the parties have not agreed to that procedure); Pet. 19 & n.9 (noting courts following California's minority view); Opp. 11-15. This Court should grant certiorari in this case as well, to resolve the deepening conflict between California's approach to the Arbitration Act's principles and that of this Court and all the federal circuit courts to have addressed the issue.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition should be granted. Alternatively, the petition should be held pending resolution of *Green Tree Financial Corp.* v. *Bazzle*, No. 02-634.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-829

IN THE

SUPREME COURT OF THE UNITED STATES

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

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OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Plaintiff/Respondent John Szetela hereby objects to the motion for leave to file brief *amici curiae* on behalf of the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, and the Chamber of Commerce of the United States. For the reasons set forth below, and because the proposed *amici's* motion is disfavored, this motion should be denied. See United States Supreme Court Rules, Rule 37.2(b).

OBJECTIONS TO ALLOWING THIS BRIEF *AMICI CURIAE* TO BE FILED

Respondent did not consent to allow the filing of the brief *amici curiae* for the simple reason that there is no need for an *amicus* brief, particularly on the limited issue of whether this Court should grant Discover Bank's ("Discover") petition for a writ of certiorari. As set forth in Rule 37.1 of the Rules of this Court, an *amicus curiae* brief that does not "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties" "burdens the Court, and its filing is not favored." This brief *amici curiae* does not raise any new matter not already raised by the parties, and it should therefore

not be permitted to be filed.

Moreover, the proposed *amici* do not have a "substantial interest" in the outcome of this case. In Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002), the California Court of Appeal considered the specific facts and circumstances of this case and held that the "no class action" provision in petitioner Discover Bank's ("Discover") arbitration clause is unenforceable under state law relating to the unconscionability of contracts. The California Court of Appeal decision does not stand for the proposition that arbitration agreements will not be enforced or that banks cannot include arbitration agreements in their consumer contracts. It only stands for the proposition that unconscionable agreements, including unconscionable arbitration clauses or portions thereof, will not be enforced. This has always been the law and is not changed as a result of the Szetela decision. Rather, the law is well-established that arbitration agreements are subject to ordinary state law defenses, including unconscionability. See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). The proposed *amici* have never been justified in relying on their contrary interpretation of the Federal

Arbitration Act and other federal law. Therefore, they have no substantial interest in the "settlement" of this question, which has never been in dispute.

The proposed *amici* also do not have a substantial interest in being able to include unconscionable provisions in their arbitration agreements and then demanding enforcement of those unconscionable provisions "according to their terms." Neither the Federal Arbitration Act nor any other federal law requires enforcement of unconscionable arbitration clauses "according to their terms." Because the proposed *amici* have no substantial interest in this case, this motion should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this motion to file brief *amici curiae* in support of Discover's petition for a writ of certiorari.

Respectfully submitted,

By: _____

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Executed on January 6, 2003, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jill Hood